Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

October Term 2002

LARRY WOLF; PETER N. HUGGER; FRED S. O'BRIEN; MAURICE D. MYERS
Petitioners

V.

ROBERT L. COLEMAN; MICHAEL A. GEORGE; ALAN CAREY; BERNARD A. YANNETTI; MATTHEW J. O'BRIEN; BERWICK TOWNSHIP; KEVIN WILSON
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.) Is a prosecutor entitled to absolute immunity where he personally prepares a search warrant for the office and files of a part-time solicitor, as part of a plan with township officials to coerce the lawyer into assisting them with their political plans against a municipal authority, where no charges are ever planned, prepared, or filed, and where the media is invited to the search and the lawyer is plainly not subject to the law?

2.) Did the Third Circuit Court of Appeals disregard the law of the Third Circuit and the law laid down by the Supreme Court, in holding that the petitioner failed to identify any protected constitutional rights under the facts pled, and that respondents, regardless, were entitled to immunity?

3.) Did the District Court, and the Third Circuit, err in dismissing Wolf's 1st, 4th, and due process claims where the respondents used their badge of authority to search and seize petitioner Wolf's office and carry away his files, and unlawfully held his already earned fees, as retaliation for his failure to assist with their actions against his public sector clients, where he broke no law, and no charges were ever prepared or filed against him?

4.) Did the courts below erroneously set aside the law of the Third Circuit and the United States Supreme Court, in holding that the Authority petitioners could not make out a 4th Amendment malicious prosecution claim after being falsely charged with "Sunshine law" violations, being forced through a summary trial, and winning a dismissal of the charges in the Court of Common Pleas, because they had suffered no "pre-trial" loss of liberty?

PARTIES TO THE PROCEEDINGS
PETITIONERS

Larry Wolf was formerly a part-time solicitor for the Berwick Township Municipal Authority. Peter Hugger, Fred O'Brien, and Maurice D. Myers were appointed Board Members for the Berwick Township Municipal Authority.

RESPONDENTS

Robert L. Coleman is Chairman of the Board of Supervisors of Berwick Township, Adams County Pennsylvania. Michael A. George was the former district attorney of Adams County. Alan Carey is a Berwick Township supervisor. Bernard Yannetti was assistant district attorney in Adams County. Matthew O'Brien and Kevin Wilson are local police officers. Beriwck Township is a municipal corporation.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit which is appealed from here, was filed on October 24, 2001 (Appendix "A"). The relevant opinion of the United States District Court for the Middle District of Pennsylvania was filed on November 13, 2000. (Appendix "B"). The decision denying a rehearing is appended as appendix "C", it was filed on December 7, 2001

JURISDICTION

The Third Circuit Opinion was filed on October 24, 2001 (Appendix "A") Rehearing was sought but denied (Appendix "C") on December 7, 2000.The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 10(c)

CONSTITUTIONAL PROVISIONS INVOLVED.

1.) The First Amendment to the United States Constitution provides in relevant part; "Congress shall make no law...abridging the freedom of speech... or the right of the people peaceably to assemble..."

2.) The Fourth Amendment to the United States Constitution provides in relevant part that; "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure shall not be violated, and no warrant shall issue, but upon probable cause.

3.) The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The petitioner Larry Wolf Esquire was a part time solicitor for the Berwick Township Municipal Authority (Authority). Petitioners Hugger, Fred S. O'Brien, and Myers were Authority board members. The respondent Coleman and Carey were Township supervisors for respondent Berwick Township. Mr. George, also a respondent, was the county district attorney. George was a political ally and close friend of Robert Coleman who was chairman of the Berwick Township Supervisors. Respondent Yannetti was an assistant to Michael George. The respondents' Wilson, and Matthew J. O'Brien, were local police officers used by Coleman and George to execute a search warrant into the offices and files of Larry W. Wolf. Mr. Coleman, chairman of the Berwick Township supervisors, was embroiled in a dispute over a local sewerage project with the Authority for whom Wolf worked. Coleman approached Wolf and solicited his help with the Authority asking him to betray his client. Wolf felt this was improper and objected. Coleman told Wolf that legal fees Wolf had already earned, but that which were supposedly subject to Township approval, would be withheld if he did not agree to help Coleman and his allies with their plans. Wolf was told not to share this information with his clients. Wolf immediately saw that Coleman was asking for his unethical participation (if not criminal action) and he properly reported Coleman's actions to his clients. Their response was to have Wolf record a judgment for his fees, a perfectly legal process for which they openly voted. Wolf was politically neutral and was not involved in any political disagreements with any persons or factions. Coleman, angered by the petitioners refusal to cooperate, then solicited Carey, a fellow Berwick supervisor, to file a private criminal complaint against the

Authority board. He convened the Township Board, and they voted to "authorize" Carey to file a private criminal complaint against Hugger, Matthew O'Brien, and Myers alleging bogus Sunshine law violations. It was decided that George should not bring the charges against the Authority member petitioners as D.A., because it would frighten the official community to have the D.A. initiate "Sunshine Act" charges against an elected official. The real reasons were different. The charges were patently frivilous. When the search for a cooperative private sector attorney to prosecute the Authority members yielded no takers, Mr. George "reluctantly" agreed to prosecute the Sunshine Act charges himself. Hugger, Matthew O'Brien, and Myers were ordered to appear before a local judge in a summary trial and were convicted. They then appealed to the Court of Common Pleas, and there Mr. George, after pleading with respondents not to sue over the matter, withdrew the charges, publically announcing that they served "no useful public purpose." The Authority petitioners expended over $10,000.00 in legal fees, were thrice subjected to compulsory process and forced to attend a trial. Meanwhile Mr. George drew up a search warrant to search Mr. Wolf's files at his lawyers office. The search warrant alleged that Wolf violated the state ethics laws and that his files might contain useful information to support a prosecution.. However, state law was plain and clear - Wolf was not subject to the law-and what he did was not unlawful. The search warrant was purely investigatory in its function and form. It was meant to intimidate and retaliate in its purpose. No criminal charges were ever prepared or filed. The search warrant was personally prepared by Mr. George. He instructed Matthew O'Brien to be the affiant, and he instructed Yannetti, an assistant DA, to personally assist in the search of Mr. Wolf's office and files, and to deliver a personal message to Mr. Wolf, that,

"George sent me". Coleman, the leader and mastermind of this plan and the political faction opposing the Authority petitioners, called the local newspaper and scheduled a reporter to appear at, the search of Wolf's office, which he did. After the search of his office, which proved traumatic for him, Wolf retained the services of one of Pennsylvania's more prominent ethics lawyers. The attorney called Mr. George and explained the state of the law and that it was plain that Mr. Wolf was not only not subject to the law but that he had done nothing wrong. Mr. George quickly backed off. He had not prepared any charges, has never charged Mr. Wolf with any violation of law, and has never returned Mr. Wolf's files which had been placed on a computer disc. Consequently Mr. Wolf alleged that his 1st Amendment rights had been violated by the respondents who were motivated by a clearly expressed intention to intimidate and coerce actions from him in support of their political goals. Because his property (his earned fees) were withheld for political reasons, there being no contract dispute, Mr. Wolf alleged due process violations also. Naturally, because the search warrant was purely investigatory, and was, as a matter of law, not supported legally, or factually, by probable cause, Mr. Wolf alleged a 4th Amendment violation of his rights to be secure in his person and things. Mr. Hugger, Mr. Fred O'Brien, and Mr. Myers alleged 4th Amendment deprivations of their right to be free of malicious prosecutions devoid of probable cause,. They also articulated claims for 1st and 14th Amendment deprivations. No discovery was conducted because respondents wished, in certain cases, to await the decision of the district court on their motions to dismiss (a practice not permitted in the Middle District of Pennsylvania) and because some defense counsel were too busy. The district court acted very quickly in holding that the plaintiffs there, petitioners here, under the facts alleged above, had identified no constitutional rights that had been violated. The Third Circuit upheld the district court. Both also held that, even if protected rights were identified, that prosecutorial immunity protected Mr. George and that the lack of pre-trial deprivations of liberty in the cases of Hugger, Fred O'Brien and Myers (a holding that is not consistent with the facts below under current Third

Circuit law) defeated the Authority petitioners' claims. Virtually none of the aforementioned facts are in dispute since for purposes of Federal Rule of Civil Procedure 12(b)(6), the facts pled in the complaint are interpreted in a light most favorable to the petitioners, and regardless, were not challenged below. In a nutshell the courts below said no constitutional violations were triggered and regardless the government defendants were immune. The 1st Amendment implications were simply not fully addressed nor were the facts, some of which were erroneously depicted as per the appropriate standard of review in the opinions. Petitioners were never given an opportunity to amend and no discovery was ever conducted through no fault of petitioners.

REASONS FOR GRANTING THE WRIT

This Court should issue the writ because under the facts alleged, the petitioners, 1.) in all cases did identify federally guaranteed rights that respondents violated namely 1st, 4th, and 14th Amendment rights and 2.) The government respondents misconduct was not privileged ie. they were not entitled to immunity and, 3.) In the case of Petitioners Hugger, Matthew O'Brien, and Myers their 1st and 4th Amendment rights were violated even though they were not incarcerated and, 4.) The district court and the appeals court departed from clearly established Third Circuit and U.S. Supreme Court rulings when they dismissed petitioners claims below, and 5.) This Court should consider clarifying the law as to prosecutorial immunity and the constitutional definition of what connotes a pre (and post) trial deprivation of liberty for purposes of 4th Amendment malicious prosecution claims.

1.) Constitutional deprivations. Under the facts alleged, and the applicable standard of review, Mr. Wolf's office was searched because of his association, both as a part time solicitor, and as a political supporter, of the Authority petitioners.

On page 3 (end of the 1st full paragraph) of their Opinion, the Third Circuit sets forth the standard of review which applies to this case, "we must accept as true the factual allegations of the complaint and all reasonable inference that can be drawn

therefrom". Petitioners made the following allegations.

1.) The respondent Coleman led the other respondents in the misconduct complained of. Complaint ¶1.

2.) The respondents, particularly Coleman and the Township, deprived Mr. Wolf of his uncontested legal fees which is a property interest. Complaint ¶'s 9 & 10.

3.) The respondents used ("misused") their authority to quash petitioners resistance to their political goals and to force them to take official action in th support of those goals. Complaint ¶12.

4.) Wolf was a part time solicitor for the local sewer authority and as such was not subject to Pennsylvania's Ethics Act. The District Court was in unquestionable error on this point and the Third Circuit did not address it.

5.) Coleman, a Berwick Township Commissioner, became engaged in a dispute with the sewer authority. Complaint ¶15.

6.) Coleman propositioned and threatened Wolf to use his influence on the Authority to help Coleman who said he would see that Wolf got paid if he did. Complaint ¶17.

7.) Wolf refused. Complaint ¶19.

8.) In July 1997 the Township "authorized" a supervisor, Alan Carey, to file a private criminal complaint against the Authority supervisors, the petitioners Hugger, Fred O'Brien, and Myers.

9.) The petitioners Hugger, O'Brien and Myers were tried and convicted in a summary trial in a district court and then appealed to the Court of Common Pleas where the defendants nol prossed the action after attempting to coerce settlement from them. Complaint ¶'s 22-26.

10.) Mr. Wolf's office was searched on May 22, 1998. No criminal charges were ever prepared or filed against him. Complaint ¶'s 27-32.

11.) Coleman knew and participated in the search, personally arranging in advance to have the press available at Wolf's law office to witness the event. Complaint ¶34.

12.) The respondents sought to deprive Wolf of his property and to quash dissent and criticism for the respondents and

their actions. Complaint ¶'s 37-38.

13.) The respondents agreed and acted unlawfully, as alleged above, to deter petitioner's political opposition to them using the power of the criminal justice system to retaliate against petitioners for failing to accede to respondent's wishes. Complaint ¶'s 1, 9, 12, 37, 38, and 45.

Appellants argue that the above allegations are not "ambiguous allegations and vague inferences" as the Third Circuit panel held. Coleman attempted to bribe Wolf. Wolf's withheld fees were his money, his property. This was not a contract dispute. Coleman arranged to have the press at Wolf's office. Coleman led Carey in the effort to file a private criminal complaint that George later admitted had no public purpose. George prepared a search warrant application (affidavit) for O'Brien that alleged Wolf was covered by the Ethics Act when he knew he was not. He clearly was not. CPC Esquire v. State Ethics Commission, 689 A2d 155 (1997). The facts were not viewed in a light with all reasonable inferences in plaintiffs' favor by the district court, they rather were viewed in a light favorable to respondent. Coleman's contacting the press beforehand in order to have them appear at the search of Wolf's office is a key material fact that indicates prior knowledge of the search, something he would have no reason to know. The Third Circuit panel not only misapprehended the clearly stated allegations that Coleman informed ("tipped") the press beforehand, but implies that Coleman commented to the press afterwards about the search. Complaint ¶34. This is not adhering to the standard of review at all, it is a misunderstanding the facts.

So too with the Third Circuit factual and legal interpretation of petitioners' malicious prosecution claims and the panels finding that no 4th Amendment liberty deprivation occurred. It is basic law in Pennsylvania that a attendance at a summary trial is compulsory. One can be imprisoned for up to a year and fined $1,000.00 in a District Court. These are not minor punishments. It was only after conviction and a later appeal that the charges were dropped, because, quite frankly, they were baseless. Yet the panel, without addressing the allegations of ¶22 of the Complaint which clearly states that the D.J. found "against the

aforementioned plaintiffs," opines on page 5 of their Opinion as follows," "Sunshine Act charges brought against individuals that were later dropped do not constitute an unlawful seizure under the Fourth Amendment". This is not consistent with the law of the Third Circuit. Charges were not merely filed and dropped without an intervening trial and conviction. In fact, see page 2 of the Opinion, "A" district court found the three guilty". The panel errs in misstating on page 5 of its own Opinion a factual interpretation which was correctly stated on page 2 of that same opinion. How is being forced to attend a trial against your will, pay an attorney, and be subjected to compulsory process and sentence, not a liberty deprivation? It is no different than arrest. The case cited in favor of the panel's holding, Merkle v. Upper Dublin School District, 211 F.3d 78 (3d Cir 2000) does not support the panels interpretation of the law which the panel applied below. Furthermore, page 792 of the Merkle Opinion (which is specifically cited by the panel) no where contains any language that supports the panel's holding that a conviction in a District Court is not a 4th Amendment liberty deprivation. In fact, the 3rd Circuit in Merkles, by holding to its line of cases from Hilfirty v. Shipman, 91 F.3d 573 (3d Cir 1996) through Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir 1998) holds to the contrary, that hearings and compulsory process can work a pre-trial deprivation of liberty. Here the defendants were forced to undergo a trial and were convicted. Merkle does not address similar facts at all on page 792, but does address the issue of "arrest". Is an "arrest" a seizure, but compulsory attendance at a trial as a defendant is not? That simply is not logical. Appellants consequently argue that the panel misapplied Merkle, their own case, and also failed to properly apply Gallo. Consequently petitioners did state a malicious prosecution claim.

2.) The appeals court misapplied the law of this Court.

The uncontradicted facts are these. Mr. George prepared the search warrant application and had Mr. O'Brien sign it. He did the purported investigation and he applied for the search warrant. He never filed charges or prepared an arrest warrant. There is no evidence he even prepared those papers. He instructed an assistant,

who he directed to assist in the search (the defendant Yannetti), to personally tell lawyer Wolf that "George sent me," which, he incidentally did. Coleman was involved in the search warrant plan to use it as a public event to injure Wolf. It did. George was not a prosecutor initiating a prosecution.

To begin with, the panel assumed that George acted in his role as district attorney when he prosecuted the appellants Hugger, Fred O'Brien, and Myers. If the record is consulted the applicable paragraph is paragraph #24 of the complaint. Originally there was a private criminal complaint engineered by Coleman, "authorized" by Berwick Township, and filed by Mr. Carey. Mr. George didn't wear his D.A. hat to prosecute this complaint - he acted as a private lawyer. The panel apparently assumed he acted as DA, but the record does not support that conclusion. The record is perhaps, at best, ambiguous, but petitioners alleged that George "personally volunteered" to do the prosecution when no other lawyer would do it. That's not a D.A. function. Similarly Mr. Wilson is found to be entitled to qualified immunity even though appellants contend all of the defendants knew Mr. Wolf had broken no law and the law did not apply to him which is not questioned. How could he not know that the execution of a legally vacuous and unfounded search warrant is an unlawful violation of a citizens rights?

The basis for Mr. George's immunity is reported by the Third Circuit to be Imbler v. Pachtman 424 U.S. 409 (1976). The panel misapplied the law of Imbler. Under the Third Circuits definition of Imbler virtually everything a prosecutor does is "initiating a prosecution". Nothing is left. Its absolute immunity, no matter what, if the facts of this case apply. This is a dangerous precedent which is inconsistent with the law laid down by this court. At page 495 (cited by the Panel) of the Imbler Opinion the high court, employing a functional approach says that prosecutors only enjoy absolute immunity when "initiating a prosecution and presenting the States case". That is an advocacy function, it is not the role of an "administrator or investigative officer rather than that of an advocate". The Panel is misinterpreting Imbler and misapprehending its application to the facts of this case. The Panel by this holding sweeps virtually every prosecutorial activity into

the "initiating a prosecution function" (which is akin to charging) and presenting the states case. It means everything is conducting a prosecution. Mr. George's activities never reached that level and the facts are abundantly clear on that issue. Mr. George's search warrant activities here were traditionally police functions, and there were never any arrests of Wolf, or charges preferred against him, or even papers prepared. The whole thing was a publicity stunt for political purposes.

If Wolf suffered an unlawful search by George because he was believed to be a political opponent of Coleman's and George, and further, that Coleman was behind the plan, as is alleged in the complaint, then Wolf argues that his 1st Amendment rights were violated because of his political association and he suffered retaliation because he would not act unlawfully to conform to Coleman and George's political demands. How could there be a more conscience shocking violation of the due process clause and the 1st Amendment, than a plan by government officials to falsely conjure up grounds to intimidate and frighten an opponent by, in effect, impliedly charging him with a crime in a search warrant application (falsely it turns out) and then to seize his office files in search of "evidence" under a law which didn't apply to him. Every bit of the "evidence" was already a matter of public record. Now to do that, respondents had no need for the press to be in attendance, but, they were invited any way. Why, in a situation that is non violent and quite unexciting, would an office search deserve being a press event? This answer is because it was a political event. This isn't like the TV show "Cops". Yet none of these material facts impacted the district court. In fact the Middle District almost seemed to dismiss the claim out of hand, at times not even questioning any, let alone all, of these unusual circumstances that implicate the 1st Amendment and the due process clause. Yes, Wolf's property (his already earned legal fees) were being improperly withheld by the Township. Those fees, however, were not being withheld because of a contract dispute or a disagreement over an amount in controversy or accuracy in billing, nor over any issue of prompt payment. The issue was holding Wolf's property hostage until he complied with

respondents political agenda. Thus there is no relevance, as the District Court implies, to the Reich v. Beharry, 883 F.2d 239 (3d Cir 1989) line of cases. The property interest in Wolf's money here implicates directly Wolf's 1st Amendment rights. This isn't a mere contract dispute as in Reich v. Beharry, 883 F.2d 239 (3d Cir 1989). This is a basic 1st Amendment and due process violation which our federal Constitution protects. Our Supreme Court doesn't seek to avoid the due process clause only to prevent its abuses. It seeks to give it meaning and a value. This is one circumstances where it applies.

In various applications of the "shocks the conscience" standard as defined in the County of Sacramento v. Lewis, 523 U.S. 833 (1998) line of cases, where the Third Circuit has addressed those situations where injury to liberty, or property interests coalesce, the Third Circuit has been quite restrictive and denied recovery except in particularly egregious situations. See Independent Enterprises Inc., v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165 (3d Cir 1997). There the Third Circuit required any substantive due process claim based upon allegations of arbritary abuse of government power to necessitate "ownership" as one of those rare property interests worthy of substantive due process protection. Here there's no question of Wolf's "ownership" interest in his money. But its important to point out that the dispute wasn't about any dispute of contract terms, it was about arbritarily keeping Wolf's money unless he were politically compliant. DeBlasio v. Zoning Bd of Adjustment for the Township of West Allegheny, 53 F.3d 592 (3d Cir 1995). Thus there is a clear distinction factually between Wolf's 4th Amendment claims based upon the unlawful search of his office, and his 1st Amendment/14th Amendment due process claims based upon the respondents arbritarily keeping plaintiff's money unless he went long with their political plans and demands. Also see Ersek v. Township of Springfield, 102 F.3d 79, 83n4 (3d Cir 1996) where the Third Circuit held that a person's substantive due process rights are violated by "irrational government action, or government action that is motivated by bias, some improper purpose or bad faith. And see Daniels v. Williams, 474 U.S. 327,

1986.

3.) Hugger, Fred O'Brien, and Myers, stated claims for 4th Amendment deprivations

The District Court opined that it cannot find how the 4th Amendment applies," to Count III of the complaint. The Court says, "In Albright (referring to Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), the United States Supreme Court, analyzing a claim of malicious prosecution, held that the right to be "free of prosecution except on the basis of probable cause" is protected by the Fourth Amendment right against unlawful seizure, and is not a substantive due process right. 510 U.S. 266 271-71," It was clear that the Court had totally missed the applicable standard of review and, also missed the allegations in the Complaint (¶'s 21-26 of the Complaint, below), which allege the frivolity and baselessness of the charges. A review, by a Common Pleas Court in Pennsylvania, of a D.J. decision, is de novo. Facing such a review George, Coleman, Carey, and the Township dropped the charges against Hugger, O'Brien and Myers. This was a termination in petitioners favor. Heck v. Humphrey applies. The district court again misses the factual point on page 12 of its memorandum where it says plaintiffs fail to state a 4th Amendment violation because, "Plaintiffs do not ...allege, any pretrial deprivation of liberty worthy of Fourth Amendment protection," meaning that being charge and put through a summary trial, where they could have been jailed for a year and fined over $1,000.00, doesn't deserve Fourth Amendment protection because there was no incarceration. Again, this is in contravention of Gallo. The Court even goes on to admit that plaintiffs were found "guilty" at a trial. Being forced to sit through a frivilous trial where they were deprived of their freedom is a deprivation. In effect, according to the District Court, if you arrest me and handcuff me without probably cause, even for a moment, you have deprived me of my Fourth amendment rights if its before my trial. But if you send me a summons and force me to spend thousands of dollars to attend a summary trial, also without probable cause, where I am denied my freedom not to avoid compulsory process, (if I don't attend, or respond to process,

I'll be arrested and jailed, without bond, on a bench warrant) and even though I prevail upon appeal, then you haven't violated my 4th Amendment rights. This would open the door to petty harassment all across our country. This is the old bootstrap argument that sleeps like a virus in Heck, that if a state court finds probable cause it was there as a matter of issue preclusion and can't be raised again. What would this have done to black citizens in the South in the middle of the last century? Heck's "termination" requirement will probably be modified some day. Regardless, according to the district court, there was no deprivation of federally guaranteed rights. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807 (1994) seems incorrectly applied by the district court. It is an analysis case. It says to look at such cases through 4th Amendment (seizure) not 1st Amendment (liberty) eyes. Being forced to attend a trial as a defendant implicates the 4th Amendment, even in Albright. This holding reverses Heck and it would encourage ill intentional local police and prosecutors, to avoid the protections of the Fourth Amendment. Petitioners believe the District Court erred.

4.) Hugger, Fred O'Brien, and Myers stated claims for the deprivation of their 1st and 14th Amendment rights?

Count IV of the Complaint, incorporated all previous allegations of the Complaint in its 14th Amendment claim. In Count IV appellants primary focus their claim of due process clause violations. But part of that claim was the inextricably interrelated 1st Amendment deprivations they suffered, ¶45 of the complaint, the district court said that the only deprivation that triggers a due process violation is the loss of property when it dismissed Count II. While this is obviously not correct, it may be as to these petitioners unless the 1st Amendment implications are brought in. The Court goes on to say that Count IV is a remade malicious prosecution claim. But the aforementioned appellant's claims for 4th Amendment violations was set out in Count III. Count IV again, was based upon a combination of inextricably related 1st and 14th Amendment claims. Baseless charges to justify the search of an attorney's office, all for political purposes to achieve control of his words and actions, is the essence of

governmental abuse. All that's left is to do these things at the point of a gun. The liberty interest here seems plain to petitioners.

The panel also failed to address and consider the holdings of the U.S. Supreme Court in Wilson v. Layne, 119 S.Ct. 1692 (1999) and Hanlon v. Berger, 119 S.Ct. 1706 (1999). Both of these cases address the 4th Amendment issue of media involvement in the execution of search warrants. Here the respondents' political leader the respondent Coleman, notified the press to attend the service and execution of the warrant at petitioner's (Attorney Wolf's) office. And, of course, they did attend and report on it. While the majority in Hanlon and Wilson held that the defendants use of the media was not a known constitutional violation in 1992 when the unlawful searches occurred, Justice Stevens pointed out that the defendant's misconduct was clearly unconstitutional prior to April 1992. Regardless, this was a settled question of federal law and a 4th Amendment violation. It appears the panel misapprehend the facts and the law of this case. Coleman, the leader of the political group who acted to injure the petitioner Wolf, was the man who called the press and invited them to attend the search and seizure of Mr. Wolf's records by the respondents who acted at the behest of Mr. George. All are state actors. These arguments further implicate the petitioners 1st Amendment rights.

CONCLUSION

The Third Circuit did not follow its own law. Under the facts in this case it also misapplied the High Court's law on prosecutorial immunity. This court should address these issues here for 3 reasons. The questions presented are of great importance. The precedent set here by the appeals court are injurious to and in derogation of established Third Circuit and national law, and this Court should address the questions regarding prosecutorial immunity and pre-trial deprivations that the Third Circuit has raised.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
[Filed October 24, 2001]
No. 00-4115

LARRY W. WOLF, ESQUIRE,
PETER N. HUGGER, FRED S.
O'BRIEN, AND MAURICE
D. MYERS,
Plaintiff/Appellant

v.

ROBERT L. COLEMAN,
MICHAEL A. GEORGE,
ALAN CAREY, BERNARD
A. YANNETTI JR., MATTHEW
J. O'BRIEN, KEVIN WILSON
AND BERWICK TOWNSHIP,
Defendants/Appellees

Appeal from the United States District Court for
the Middle District Court of Pennsylvania.
No.4:CV-00-0919 James F. McClure, Jr.
District Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 10, 2001

BEFORE:SCIRICA, GREENBERG, and COWEN, Circuit Judges

MEMORANDUM OPINION
COWEN, Circuit Judge

Larry Wolf, Peter Hugger, Fred O'Brien, and Maurice Myers ("Appellants") appeal the order of the District Court granting Defendants/Appellees Motion to Dismiss. For the following reasons, we will affirm.

Hugger, O'Brien and Myers are former members of the Berwick Township Municipal Authority ("BTMA"). Wolf is a former part-time solicitor for BTMA. Appellees include Berwick Township along withe the following: Coleman and Carey are Berwick Township Supervisors; George is an Adams County District Attorney; Yannetti is an Adams County Assistant District Attorney; Wilson is a detective fo the Borough of Gettysburg Police Department; and O'Brien is a Detective in Adams County.

Appellants allege that a dispute arose between the BTMA and Berwick Township Supervisors regarding a sewer project undertaken by the BTMA. BTMA refused to pay the legal fees generated by Wolf as the solicitor for BTMA. Appellants further allege that Coleman told Wolf that the legal fees would not be payed unless Wolf used his influence to support the Township's position with regard to the sewer project.

In 1997, District Attorney George prosecuted charges against Hugger, O'Brien, and Myers for violations of the Sunshine Act, 5 U.S.C. 552b. A district justice found the three guilty. These charges were subsequently withdrawn or dismissed. Subsequently, pursuant to a search warrant obtained by the Adams County District Attorney's Office, Yannetti, O'Brien, and Wilson searched Wolf's law office and downloaded from his computer files relating to his legal representation of the BTMA.

Appellants allege that Coleman informed the press of the search.

Appellants' five-count Complaint brought under 42 U.S.C. §1983 alleges: violations of their First, Fourth, and Fourteenth Amendment rights; violations of their substantive due process rights; and conspiracy. The District court held that Appellants failed to state claims upon which relief could be granted, pursuant to that Fed. R. Civ.P.12(b) (6) and dismiss all the federal claims. In the alternative, the District Court dismissed all applicable claims against Appellees Wilson and George on the basis of

immunity. Finally, the District Court also dismiss Appellant' state law claim of conspiracy, declining to exercise supplemental jurisdiction. Our review is plenary. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir 1996). ("We must determine whether, under any reasonable reading of the pleadings, the plaintiffs may be entitled to relief, and we must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.").

Wolf alleges that violations of his First Amendment rights based upon Appellees refusal to pay his legal fees. Myers, Hugger, and O'Brien allege that Coleman, Carey, George, and Berwick Township retaliated against them by engaging in ulterior political motives. Appellants also allege retaliation by Coleman for his decision not to pay Wolf's legal fees and to prosecute them for violations of the Sunshine Act.

After a careful review the record, we conclude that none of the Appellants' claims constitute constitutionally protected conduct or rights. See Mount Healthy City School Dist.Bd. Of Educ v. Doyle, 429 US. 274 287, 97 S.Ct. 568 91977) (the initial burden is placed on the plaintiff to show "that his conduct was constitutionally protected"). The appellants are therefore not entitled to relief for these claims because "there Complaint [fails to] allege deprivation of any rights secured by the Constitution." Nami, 82 F.3d at 65.

Appellants next allege a violation of the Fourth Amended by reason of the search of Wolf's office. This claim is based on the fact that the "search warrant merely states, in conclusory fashion, that Wolf violated Pennsylvania Ethics Act". Appellants Brief at 11. Appellants failed to allege O'Brien, the affiant, made any false statements, misrepresentations, or omissions that were material or necessary to the probable cause finding. The dismissal of this claim by the District Court was also correct. See Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) ("A section 1983 Plaintiff who challenges of validity of a search warrant by asserting that law-enforcement agents submitted a false affidavit to the issuing judicial officer must satisfy the two-part test developed by the Supreme Court in Franks v. Delaware.....")

(citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676-77 (1978).

Appellants also make a constitutional malicious prosecution claim predicated on the Fourth Amended by reason of the initial charges lodged against O'Brien, Myers, and Hugger for violations of the Sunshine Act. They fail, however, to allege any deprivation of a Fourth Amendment liberty. Sunshine Act charges brought against individuals that were later dropped do not constitute an unlawful seizure under the Fourth Amendment. See Merkle v. Upper Dublin School Dist, 211 F.3d 782, 792 (3d Cir 2000). Appellants are entitled to no relief under this claim, and we will affirm the District Court.

Appellants also allege substantive due process claims for refusal to pay Wolf's legal fees and for the malicious prosecution of O'Brien, Myers, and Hugger for violations of the Sunshine Act. Because Appellants do not allege violations of protected property interest protected by the Fourteenth Amendment- the threshold question any substantive due process claim -their claim with regard to Wolf's attorney fees was properly dismissed. See Nicholas v. Pen State Univ, 227 F.3d 133, 139-40 (3d Cir. 2000) ("To prevail on a non-legislative substantive due process claim, a plaintiff must establish as a threshold matter that he has a protected property interest in which the Fourteenth Amendment's due process protection applies.") (citing Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123 93d Cir 2000)). Likewise, the District Court properly dismissed the malicious prosecution claims because under Supreme Court precedent, a §1983 malicious prosecution and cannot be based on a substantive due process violation. Albright v. Oliver, 510 U.S. 266, 272, 114 S.Ct. 807 91994); Merkle, 211 F.3d at 792.

Appellants also make §1983 conspiracy claims. The claims arise from: the allege malicious prosecution of O'Brien,

Hugger and Myers; Appellees' refusal to pay wolf's attorney's fees; the search of Wolf's office; and appellee called's Coleman's statement to the press about the search. The District Court also correctly dismiss these claims, "ambiguous allegations and vague inferences" are not sufficient to make a claim for conspiracy under §1983. Ridgewood Bd of Educ v. N.E. 172 F.3d 238, 254 (3d Cir. 1999) ("In order to prevail on a conspiracy claim under §1983, a plaintiff was prove that persons acting under color of state law conspired to deprive him of a federally protected right.") (citing Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183 (1980); Lake v. Arnold, 112 F.3d 682, 689 (3d Cir 1997)).

Appellants also assert that George and Wilson were not entitled to immunity. The law is clear, however, that George, as Adams County District Attorney, is entitled to absolute prosecutorial immunity for his role in prosecuting Appellants for violations of the Sunshine Act and for his role in the application for the search warrant of Wolf's office. Imbler v. Packman, 424 U.S. 409, 431, 96 S.Ct. 984, 995 (1976))"[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983."). Likewise, Wilson, as a detective the of the Borough of Gettysburg Police Department, is entitled to qualified immunity for his role in the search of Wolf's office. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) (bare allegations of malice do not suffice for the standards is that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (citations omitted); Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir 1997).

Finally, Appellants allege conspiracy under Pennsylvania state law pursuant to 28 U.S.C. §1367. The District Court

dismissed this claim pursuant to 28 U.S.C. 1367(c)(3), declining to exercise supplemental jurisdiction in light of the dismissal of all of appellants' federal claims. We review the District Court's decision for abuse of discretion. Lazorko v. Penn. Hosp. 237 F.3d 242, 247)3d Cir 2000). Given the District Court's dismissal of all the federal claims, it did not abuse its discretion in declining to exercise supplemental jurisdiction of the state law claim. See united Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966).

For the foregoing reasons, the judgment of the District Court entered on Nov. 13, 2001 be affirmed.

TO THE CLERK

Please file the forgoing opinion

/sRobert E. Cowen
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed November 13, 2000]

No. 4:CV-00-0919

LARRY W. WOLF, ESQUIRE,
PETER N. HUGGER, FRED S.
O'BRIEN, AND MAURICE
D. MYERS,
Plaintiff/Appellant

v.

ROBERT L. COLEMAN,
MICHAEL A. GEORGE,
ALAN CAREY, BERNARD
A. YANNETTI JR., MATTHEW
J. O'BRIEN, KEVIN WILSON
AND WARWICK TOWNSHIP,

Defendants/Appellees

Appeal from the United States District Court for
the Middle District Court of Pennsylvania.
No.4:CV-00-0919 James F. McClure,
District Judge

MEMORANDUM

November 13, 2000

On May 22, 2000, Plaintiffs commenced this action against defendants with the filing of the Complaint pursuant to 42 U.S.C. §1983. Plaintiffs assert federal claims against defendants for alleged violations of Plaintiff's first, fourth and fourteenth amendment rights. Specifically, Plaintiffs allege that Defendants conducted an unlawful search of Plaintiff Wolf's law office and (Count I); that Defendants refused to pay Wolf's legal fees for his work as part-time solicitor for the Berwick Township Municipal Authority (Count II); and that Defendants engage in the malicious prosecution of Plaintiffs O'Brien, Myers and Hugger (Count III). Additionally, Plaintiffs assert both federal and supplemental state law claims for conspiracy (Counts IV and V)

Now before the Court are to Defendants' motions to dismiss Plaintiffs Complaint for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6). For the reasons that follow, we will grant Defendants' motions.

I. STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) admits the well pleaded allegations of the Complaint, but denies their legal sufficiency. Hospital Bldg. Co. v. Trustees of the Rex Hosp., [1]425 U.S. 738, 740 (1976). The Complaint must be construed in

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The terms "defendants" and "plaintiffs" are used here to describe generally the claims alleged in plaintiffs complaint and do not necessarily specify the named individuals involved; clarification of the claims filed by and against particular individuals is provided below.

favor of the plaintiff with every doubt resolved in the plaintiff's favor. In re Arthur Treacher's Franchise Litigation, 92 F.R.D. 398, 422 (E.D.Pa. 1981). That is, the Court must except as true all factual allegations set forth in the Complaint as well as all reasonable inferences that can be drawn from them Nami v. Frauver, 82 F.3d 63, 65 (3d Cir. 1996); Jordan v. Fox Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court looks only to the facts alleged in the Complaint and any attachments, without reference to any other parts of the record. Jordan at 1261. "[A] case should not be dismissed unless adduced clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations."Id. (Citing inter alia. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Whether a Plaintiff will ultimately prevail is not a consideration for review of motion under Rule 12 (b)(6).

Generally, only allegations of the complaint, exhibits attached to the complaint, and matters of public record are considered on a motion to dismiss. Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)), cert, denied, 510 U.S. 1042 (1994). However, a document appended to the defendant's motion to dismiss may be considered it is conceitedly authentic and the complaint is based on the document, thereby preventing a plaintiff from avoiding proper dismissal by simply failing to attach to the complaint a dispositive document on which it relied Id.

II. STATEMENT OF FACTS

For the purposes of this motion, we accept as true the following factual averments in Plaintiffs complaint. Plaintiffs Hugger, O'Brien, and Myers are former members of the Berwick Township Municipal Authority (BTMA) located in Pennsylvania. Wolf is a former part-time solicitor for the BTMA. Defendants

[2]are as follows: Coleman and Carey, Berwick Township Supervisors), George, Adams County District Attorney; Yannetti, Adams County Assistant District Attorney; Wilson, Detective, Borough of Gettysburg Police Department; O'Brien, Detective, Adams County; and Berwick Township. The allegations of all three specific incidents: Plaintiffs submit that (1) Defendants have deprived Plaintiff Wolf of attorney fees; (2)Plaintiffs were maliciously prosecuted for violations of the Sunshine Act; and (3) Wolf's law office was unlawfully search without probable cause.

In 1995, and alleged dispute arose between the BTMA and the Berwick Township Supervisors regarding a sewer project undertaken by the BTMA. As a result of this dispute, Berwick Township allegedly refused, and continues to refuse, to pay the legal fees generated by Wolf in his capacity as solicitor for the BTMA. In 1997, Coleman purportedly informed Wolf that Berwick Township would not pay the Wolf's legal fees unless Wolf "used his influence to support the Township's position" with regard to the aforementioned sewer project. Plaintiffs' Complaint record document no. 1, at 17. This dispute forms a basis for Count II of Plaintiffs complaint, alleging a violation of Wolf's First and Fourteenth Amendment rights.

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In this case, we consider the Appendix of Exhibits in Support of Defendant, Kevin Wilson's Motion to Dismiss Plaintiffs' Complaint, including the search warrant and affidavit claimed by plaintiff to be "baseless". The affidavit and warrant will be discussed below in an analysis of plaintiffs' Fourth Amendment claim.

In 1997, and District Attorney George prosecuted charges against Hugger, O'Brien and Myers for violations of the Sunshine Act, 5 U.S.C.A. 552b. Following a hearing before a district justice, Plaintiffs were adjudged guilty of these violations. Subsequently, 1999, after plaintiffs filed an appeal in the Court of Common Pleas, Adams County, Pennsylvania, George dropped the charges against them. The initial charges are those now alleged by plaintiffs in Count III of their complaint to have been maliciously brought against them in the first place.

On May 22, 1998, Defendants Yannetti, O'Brien and Wilson searched Plaintiff Wolf's law office and downloaded from his computer files pertaining to his legal representation of the [3]BTMA., pursuant to a warrant obtained by the Adams County District Attorney's Office. Additionally, Coleman purportedly "tip[ped] off the press" of the search. Plaintiffs' Complaint ¶34. These incidents form the basis for Count I of Plaintiffs complaint, alleging a violation of Wolf's Fourth Amendment rights.

III. SECTION 1983 CLAIMS

42 U.S.C. §1983 provides relief for a violation of a federal constitutional or statutory right, and is not itself a source of any new substantive rights. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir 2000) (citing Baker v. McCollan, 443 U.S. 137, 144 n. 3 (1979)). To launch successfully a claim under 42 U.S.C. 1983, Plaintiffs must allege that Defendant "deprived [them] of a federal constitutional or statutory right while acting under color of state law." Labalokie v. Capitol Area Intermediate Unit, 926 F.Supp, 503, 506 (M.D.Pa. 1996) (citing Carter v. City of Philadelphia, 989 F.2d 117, 119 (3d Cir. 1993)). Here, plaintiffs' complaint

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3 Wolf's legal fees were estimated at $11,376.00.

hinges on Defendants' alleged violation of Plaintiffs' First, Fourth and Fourteenth Amendment rights, as well as an allege conspiracy to violate those rights.

A. FIRST AMENDMENT CLAIMS

Plaintiffs assert violations of their First Amendment rights in Counts II and IV of their complaint. Plaintiff Wolf submits that all defendants violated his First Amendment rights by refusing to pay him his earned legal fees in retaliation for "not joining Coleman in his brand of vindictive, unlawful politics." Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion to Dismiss record document No. 18 at 15 (Count II).

Additionally, Plaintiffs Myers, Hugger, and O'Brien claim that Defendants Coleman, Carey, George and Berwick Township decided "to engage in unlawful activities for ulterior political purposes seeking to retaliate against plaintiffs . . . ." (Count IV). Plaintiffs' complaint at 45. We also interpret plaintiffs complaint to include allegations of retaliation by Coleman against plaintiffs for their failure to support the Township's position with regard to the dispute surrounding the above-mentioned BTMA sewer [4]project. We assume the retaliation alleged comes in the form of nonpayment of legal fees and purported malicious prosecution. We agree with Defendants that Plaintiffs' allegations cannot implicate the First Amendment.

Plaintiff in a §1983 First Amendment retaliation case has

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The search warrant was issued by District Justice Mervin L. Dubs on May 22, 1998. Dubs found probable cause to believe that the property sought was evidence of Wolf's commission of a crime in violation of 65 Pa. Stat. Ann 403(a) (since repealed, now 65 Pa. Stat. Ann 1101.1 et seq.), relating to conflicts of interest involving public officials and employees.

the burden of establishing that his or her "constitutionally protected conduct" was a "substantial" or "motivating factor" in the defendant's decision. Mt. Healthy City School Dist. Bd. of Educ v. Doyle, 424 U.S. 274, 287 (1977) (hereinafter cited as Mount Healthy); Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 144 (3d Cir 2000). The burden then shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision... even in the absence of the protected conduct." Mount Healthy, 424 U.S. at 287.

In this case, Plaintiffs make no attempt to satisfy the causation requirement that annunciated by the United States Supreme Court in Mount Healthy for their First Amendment retaliation claim. Indeed, Plaintiffs do not assert in Counts II and IV any constitutionally protected conduct or right that has been deprived by Defendants' (1) refusal to pay Wolf attorney's fees and (2) decision to prosecute Plaintiffs for violations of the Sunshine Act. Accordingly, Plaintiffs have failed to state a claim upon which relief can be granted, and we will dismiss their First Amendment claims in Counts II and IV of their complaint.

B. FOURTH AMENDMENT CLAIMS

1. Unlawful Search

Plaintiff Wolf alleges a Fourth Amendment violation against that is George, Coleman, Yannetti, O'Brien and Wilson for the search of his office conducted on May 22, 1998. (Count I). Plaintiff attacks the lawfulness of th search on the ground that there is no probable cause to support the search. We find the facts alleged to be insufficient to support a Fourth Amendment violation [5]that will dismiss Count I on this basis.

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We construe Count IV of plaintiffs' complaint to be based on the claims of malicious prosecution in Count III and Count V to

In Franks v. Delaware, 438 U.S. 154, 155-56 (1978), the United States Supreme Court Established a two-part test to be satisfied by Plaintiff asserting a §1983 claim a challenging the validity of a search warrant on probable cause grounds. Specifically, "the Plaintiff must prove, by preponderance of the evidence, (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, but made false statements or omissions that create a falsehood in applying for a warrant, and (2) that such statements or omissions are material, or necessary to the finding of probable cause". Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citing Franks, 438 U.S. at 171-72).

In this case, Wolf does not assert that affiant, defendant O'Brien, made any misrepresentations, false statements or omissions that were material to the finding a probable cause. Notably, Plaintiffs' only specific claim on this matter is that the "probable cause affidavits [George] had prepared for the bogus search warrant used, was baseless." Thus Plaintiffs' fail to satisfy both prongs of the Franks standard.

The affidavit at issue reports a violation by Wolf of 65 Pa. Stat. Ann. 403(a) (since repealed, now 65 Pa. Stat.Ann 1101.1 et seq.) relating to conflicts of interest involving public officials and employees 65 Pa..Stat Ann. 1103 (a) provides: "No public official or public employee shall engage in conduct that constitutes a conflict of interest." Wolf was a "public official" under 65 Pa. Stat. Ann 1102 in his capacity as the solicitor for the BTMA The affidavit establishes probable cause to search Wolf's office for

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be based upon the factual averments in Counts I-IV; both will be discussed below.

forms, files and documentation pertaining to his legal representation of the BTMA. For instance, the affidavit reports that on April 22, 1998, "Wolf did appear in the office of the Prothonotary of Adams County and filed a civil action against Berwick Township Municipal Authority alleging that he was the solicitor for the Authority and that his bill for legal representation had not been paid." Additionally, the very next day, or Wolf "filed an Answer and Confession of Judgment on behalf of the Berwick Township Municipal Authority Acting As Their Solicitor." Such assertions establish probable cause to belief that Wolf was involved in a conflict of interest in violation of aforementioned 65 Pa. State. Ann 1101.1 et seq. Upon finding probable cause, District Justice Mervin L. Dubs issued the search warrant to search Wolf's office. Accordingly, we find plaintiff's assertion that the probable cause affidavit was "baseless" to indeed be baseless in and of itself. Plaintiff has again failed to state a claim upon which relief can be granted, and we will dismiss Count I..

Plaintiffs O'Brien, Myers and Hugger assert a constitutional malicious prosecution claim predicated on the Fourth Amendment against Defendants Coleman, Carey, George and Berwick Township. (Count III). Specifically, Plaintiffs allege that charges of violations of the Sunshine Act were brought against them maliciously by defendants in retaliation for plaintiffs' involvement with the BTMA. Defendants refute Count III of plaintiffs complaint by analyzing it under the elements of the common law tort of malicious prosecution."

As recently noted by the Third Circuit:

It was in one time the law of this circuit that a plaintiff alleging a §1983 claim for malicious prosecution would be required only to show the elements of the common law tort. See Lee v. Mihalich, 847 F.2d 66, 69-70 (3d Cir. 1988). However, in the aftermath of the Supreme Court's decision in Albright v.

Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), this court has acknowledged that this is no longer the case.

Merkle v. Upper Dublin School District, 211 F.3d 782, 792 (3d Cir. 2000). In Albright, the United State Supreme Court, analyzing a claim of malicious prosecution held that the right to be "free from prosecution except on the basis of probable cause" is protected by the Fourth Amendment right against unlawful seizure, and not a substantive due process rights. 510 U.S. 266, 271-71. Therefore, "a claim of malicious prosecution under §1983 cannot be based on substantive process considerations, but instead must be based on a provision of the Bill of Rights providing an explicit textual source of constitutional protection." Merkle, 211 F.3d at 792 (quoting predicate their constitutional malicious prosecution claim on the Fourth Amendment. We, therefore, analyze Count III of plaintiffs' complaint accordingly.

> **The Fourth Amendment provides:**
> The right of people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons are things to be seized.

In deciphering Plaintiffs' complaint, we simply cannot find how the Fourth Amendment applies. They cannot attempt to allege, nor can they allege, any pretrial deprivation of liberty worthy of Fourth Amendment protection. In this case, a district Justice initially found Plaintiffs guilty of the charges brought against them-charges later dropped after Plaintiffs filed a notice of appeal. It is inconceivable how this would constitute and "unlawful seizure" under a Fourth Amendment analysis. See

Albright 510 U.S. at 271 (stating that Plaintiffs' "surrender to the State's show of authority [regarding arrest pursuant to warrant [6]obtained without probable cause] constituted a seizure for purposes of the Fourth Amendment"). Indeed, in no way do plaintiffs attempt to relate Count III of their complaint to the rights safeguarded by the Fourth Amendment. Accordingly, we will dismiss Count III of Plaintiffs Complaint because the facts alleged fail to assert a constitutional violation for which relief could be granted.

C. SUBSTANTIVE DUE PROCESS CLAIMS

Plaintiffs allege substantive due process violations in Counts II and IV of their complaint. In Count II, Plaintiffs claim that Defendants Coleman, George, O'Brien, Yannetti and Berwick Township violated the substantive due process component of the Fourteenth Amended by refusing to pay Wolf legal fees for his work for the BTMA. Additionally, Count IV of Plaintiffs' complaint asserts substantive due process violations against Defendant Coleman, Carey, George and Berwick Township, presumably for the same claims of malicious prosecution alleged in Count III above.

To succeed on a substantive due process claim pursuant to §1983, a plaintiff must establish that he or she had a property interest protected by the Fourteenth Amendment's due process clause. Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000). It is necessary to determine whether the property

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As demonstrated below, the claims of substantive due process violations in Counts II and IV will be dismissed on other grounds.

interest allegedly being deprived is "fundamental" under the United States Constitution. Nicholas v. Pennsylvania State University, 227 F.3d 133, 140 (3rd Cir. 2000) (finding no fundamental property interest in tenured public employment) The Third Circuit has exercised great care and caution in determining property interests worthy of substantive due process protection to other, less fundamental property interests."Id at 141. Generally, the Third Circuit has held state-created property interests to be unworthy of substantive due process See id. At 143; Reich v. Beharry, 883 F.2d 239 (3d Cir 1989) (refusing to grant substantive [7]due process protection to state service contract); Ransom v. Marrazzo, 848 F.2d 398 (3d Cir 1988) (finding no substantive due process protection for tenant's state law entitlement to water an sewer services); Mauriello v. University of Medicine & Dentistry of New Jersey, 781 F.2d 46 (3d Cir 1986) (student's interest in continued education at state university not worthy of substantive due process).

In this case, plaintiffs' substantive process claimed in Count II of their complaint fails to implicate a property interest worthy of protection. Specifically, we find no substantive due process violation for the defendants' failure to pay off Wolf attorney's fees. Although Wolf may be able to assert state law contract claim, and the interest in attorney's fees asserted by

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In fact, as previously stated, defendant O'Brien, not George is named as the affiant on the Search Warrant and Affidavit. Exhibit A, Appendix of Exhibits in Support of Defendant, Kevin Wilson's Motion to Dismiss Plaintiffs' Complaint.

plaintiff bears no resemblance to any fundamental right protected by the Constitution. Accordingly we will dismiss Count II of Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

Substantive due process violations alleging Count IV also fails to stay the claim. It appears that Plaintiff's attempt to assert a fourth amendment malicious prosecution claim grounded in a substantive due process claimed. However, as discussed above, the Supreme Court is held that a §1983 malicious prosecution claim cannot be based on the violation of substantive due process rights but, rather, a constitutional provision such as the Fourth Amendment right to be free from unlawful seizure.

D. CONSPIRACY CLAIMS

The first four counts of plaintiffs' complaint allege §1983 conspiracy claims. Defendants Coleman, Carey, Wilson and Berwick Township attack Plaintiffs' conspiracy claims on the ground that the claims are not pled with sufficient particularity. We agree.

In order to succeed only conspiracy claim under 42 U.S.C.

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A public official is defined as:

[a]ny person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof. 65 Pa. Stat. Ann 1102.

§1983 Plaintiffs must establish that "persons acting under the color of state law conspired to deprive [them] of a federally protected right."Ridgewood Bd. Of Educ. V. N.E. ex rel. M.E. 172 F.3d 238, 254 (3d Cir. 1999) (citing Dennis v. Sparks, 449 U.S. 24, 29 (1980); Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997)). Additionally, "[a] plaintiff must make specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, playing, or conspire to carry out the allege a chain of events."Panayotides v. Rabenold, 35 F.Supp. 2d 411, 419 (E.D.Pa. 1999) (quoting Hammond v. Creative Financial Planning, 800 F.Supp. 1244, 1248 (E.D. Pa. 1992). The court in Panayotides went on to note that "only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain other action of the alleged conspirators taken to achieve that purpose will be deemed sufficient..." 35 F. Supp 2d 419 (further citations omitted).

Here, plaintiffs base their conspiracy claims on (1) the alleged malicious prosecution of Hugger, O'Brien and Myers under the Sunshine Act; (2) to be Defendants' refusal to pay Wolf attorney's fees for his work for the BTMA; and (3) the search of Wolf's office conducted by defendants Yannetti, O'Brien and Wilson on May 22, 1998; and (4) Coleman's statement of the search to the press.

Plaintiffs generally identify the object of these conspiracies as one "to deprive Plaintiffs of their rights under the federal and state constitution... forced to resign... intimidate them... deter their proper and lawful attention to their official duties... harass them, and... teach them not to question Mr. Coleman's authority and power." Plaintiff Complaint at paragraph 47. Plaintiffs submit that Defendants "all acted unlawfully together, for an unlawful purposes," were part of a "plot to refuse Mr. Wolf his properly

justly earned fees" and "conspired to deprive... Defendants [sic] of their 4th Amendment guarantee to be free of malicious prosecutions." Plaintiffs' Complaint at 47, 37, 41. Plaintiffs fail, however, to allege sufficiently that defendants engaged in specific instances of conduct based on an agreement or understanding to deprive plaintiffs of their constitutional rights. Indeed, Plaintiffs make conclusory allegations of conspiracy and, therefore, failed to present sufficient facts to make out a 1983 conspiracy claim. See Panayotides, 35 F.Supp. At 420.. Even when considering the factual averments in a light most favorable to the Plaintiffs, we cannot find that the factual scenario painted by the conduct allege could reasonably constitute a conspiracy to violate Plaintiffs' rights. Plaintiffs also fail to identify the period of any alleged conspiracy. Accordingly, we find that plaintiffs do not allege a viable civil rights conspiracy claim and will dismiss the claims on this basis.

E. IMMUNITY

1. Qualified Immunity

Defendant Wilson contends that his motion to dismiss should be granted on the alternative ground that he is entitled to qualified immunity for his role in the search of Wolf's office. According to Wilson, he's not engage in any actions at violate the constitutional right to Wolf.

Government officials performing discretionary functions are generally insulated from liability for civil damages where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997).

In the instant case, it is clear that Wilson could have reasonably believed his conduct did not violate Wolf's rights. Specifically, it was reasonable for him, as a detective, to act

pursuant to a search for obtained with probable cause and issued by a detached and neutral magistrate. In fact, we conclude that Wolf did not allege any deprivation of a constitutional right. [9]Accordingly, we hold that Wilson is entitled to qualified immunity, providing a further basis for dismissal of Count I as against him.

2. Prosecutorial Immunity

Defendant George asserts that, as Adams County District Attorney, he is entitled to absolute immunity for his role in permitting the application for the search warrant, and subsequent search, of Wolf's law offices and for his decision to prosecute Plaintiffs O'Brien, Myers and Hugger for violations of the Sunshine Act. We agree.

State prosecutors are entitled to absolute immunity from civil suit for damages under §1983 for their conduct in "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (finding that common law prosecutors are absolutely immune from §1983 suits for malicious prosecution). This is the case so long as the complained of conduct is "intimately associated with the judicial phase of the criminal process." Id. At 430. See also Burns v. Reed, 500 U.S. 478 (1991).

Because the issuance of a search warrant is a judicial act, we find that George's complained of conduct of permitting application for the search warrant and search of Wolf's office to be "intimately associated with the judicial phase of the criminal

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9 As addressed below, plaintiffs also ground this claim on substantive due process violations in Count IV of their complaint.

process." Therefore, George is absolutely immune for his role in regards to the search warrant and search. Furthermore, under Ambler, we find George absolutely immune from Plaintiffs' section §1983 claims of malicious prosecution. Accordingly, we find George absolutely immune for his role in Count I and III of Plaintiffs' complaint, which is an alternative ground for dismissal of those counts as against him.

IV. STATE LAW CLAIM OF CONSPIRACY

Further, we will dismiss Count V of Plaintiffs' complaint, which asserts a supplemental state law Plaintiff conspiracy. Plaintiffs' state law claim of conspiracy comes before this Court pursuant to 28 U.S.C. §1367. Under §1367(c)(3), we have the discretion to decline to exercise supplemental jurisdiction over Count V of Plaintiffs' complaint were we have dismissed all claims over which we had original jurisdiction. See also United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) (recommending dismissal of state claims when federal claims are dismissed). Accordingly, because we will dismiss counts I - IV of Plaintiffs' complaint for failure to state a claim upon which relief can be granted, we will also dismiss Count V of Plaintiffs complaint.

An order consistent with this Memorandum will issue.

James F. McClure, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-4115

LARRY W. WOLF, ESQUIRE,
PETER N. HUGGER, FRED S.
O'BRIEN, AND MAURICE
D. MYERS,
Plaintiff/Appellant

v.

ROBERT L. COLEMAN,
MICHAEL A. GEORGE,
ALAN CAREY, BERNARD
A. YANNETTI JR., MATTHEW
J. O'BRIEN, KEVIN WILSON
AND BERWICK TOWNSHIP,
Defendants/Appellees

(D.C. Civ.No. 00-CV-00919)

SUR PETITION FOR REHEARING

Present: Becker, Chief Judge,

SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, GREENBERG*, AND COWEN*, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

*As to panel rehearing only

BY THE COURT,

Circuit Judge

Dated: December 07, 2001

Respectfully Submitted,

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Supreme Court, U.S.
FILED
MAR 11 2002

(2)

No. 01-1148

IN THE

Supreme Court of the United States

LARRY WOLF; PETER NM HUGGER; FRED S. O'BRIEN; and MAURICE D. MYERS,

Petitioners,

v.

ROBERT L. COLEMAN; MICHAEL A. GEORGE; ALAN CAREY; BERNARD A. YANNETTI, JR.; MATTHEW J. O'BRIEN; BERWICK TOWNSHIP; and KEVIN WILSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the District Court and Court of Appeals, in its review, properly dismissed Count I of the Complaint, alleging a Fourth Amendment violation, for failure to state a claim where there was no direct attack on the validity of the applicable search warrant nor was there any allegation that the officer preparing the warrant application deliberately falsified information or included information in reckless disregard of its truth or falsity?

2. Whether the District Court and Court of Appeals, in its review, properly dismissed Petitioners' Complaint for failure to state a § 1983 conspiracy, where Plaintiffs' "ambiguous allegations and vague inferences" failed to specifically allege the necessary elements of a conspiracy?

3. Whether the District Court and Court of Appeals, in its review, properly dismissed Count II of the Complaint for failure to state a substantive due process or First Amendment retaliation claim, particularly where Petitioners failed to alleged a violation of a protected property interest?

4. Whether the District Court and Court of Appeals, in its review, properly determined that Count III of Petitioners' Complaint failed to state a claim for a § 1983 malicious prosecution based on the Fourth Amendment, where the Complaint failed to allege any pretrial deprivation of their personal liberty worthy of protection afforded by the Fourth Amendment?

5. Whether the District Court and Court of Appeals, in its review, properly determined that Count IV of Petitioners' Complaint failed to state a claim upon which relief could be granted, particularly where there was no discernible due process violation?

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1. It should be noted that contrary to Supreme Court Rule 24(a) the questions raised in Petitioners' "Questions Presented" are substantively different from those mentioned in the body of their Argument.

6. Whether the District Court and Court of Appeals, in its review, properly determined that Respondent George was entitled to absolute prosecutorial immunity?

7. Whether the District Court and Court of Appeals, in its review, properly determined that Detective Wilson was entitled to qualified immunity where it is clear that he could have reasonably believed that his conduct did not violate Petitioner, Wolf's rights?

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COUNTERSTATEMENT OF THE CASE

Initially, contrary to Supreme Court Rule 24(g), Petitioners completely fail to make appropriate citations to the facts of record in their Statement of the Case. More importantly, Petitioners now include facts not of record below, which are not appropriate for consideration by this Honorable Court. Specifically, Petitioners allege, in part, the following facts not of record: Mr. Coleman approached Petitioner, Wolf and asked him to "betray his client"; Wolf was told not to share information with his clients; Mr. Wolf reported Coleman's actions to his clients and, ". . . the response was to have Wolf record a judgment for his fees, a perfectly legal process for which they openly voted"; Wolf was politically neutral and was not involved in any political disagreements with any persons or factions; it was decided that George should not bring the charges against the authority member Petitioners as D.A., because it would frighten the official community to have the D.A. initiate "Sunshine Act" charges against an elected official; Coleman called the local newspaper and scheduled a reporter to appear at the search of Wolf's office; Wolf retained the services of one of Pennsylvania's more prominent ethics lawyers who called Mr. George and explained the state of the law and that it was plain that Mr. Wolf was not only not subject to the law, but that he had done nothing wrong; "no discovery was conducted because Respondents wished in certain cases to await the decision of the District Court on their Motions to Dismiss . . . and because some defense counsel were too busy." (See Petition, pp. 2-6).

Conversely, the facts of record as alleged in the Complaint and outlined in the respective District Court and Appellate Court Opinions are set forth below.

On May 22, 2000, Plaintiff/Appellants/Petitioners, Larry Wolf, Peter Hugger, Fred S. O'Brien and Maurice D. Myers instituted this purported civil rights action in order to

recover for alleged violations of their federally protected rights in an action against Robert L. Coleman, Adams County District Attorney Michael A. George, Alan Carey, Adams County Assistant District Attorney Bernard A. Yannetti, Jr., Detective Kevin Wilson of the Borough of Gettysburg Police Department, Adams County Detective Matthew J. O'Brien and Berwick Township. Petitioners alleged generally that the Defendants/Respondents conducted an unlawful search of Larry Wolf's law office (Count I); that Defendants/Respondents refused to pay Wolf's legal fees for his work as a part-time Solicitor for the Berwick Township Municipal Authority (Count II); and that Defendants/ Respondents engaged in the malicious prosecution of the remaining Petitioners, O'Brien, Myers and Hugger (Count III). In addition, Petitioners assert both federal and supplemental state law claims for conspiracy (Counts IV and V). (App. 8a).

Petitioners, Peter Hugger, Fred S. O'Brien and Maurice D. Myers are former members of the Berwick Township Municipal Authority (hereinafter "BTMA"). (App. 9a; Comp. at ¶1).[2] Petitioner, Larry Wolf allegedly is a former part-time Solicitor for BTMA. (App. 9a; Comp. at ¶13). The Complaint is based on three separate incidents. Initially, Mr. Wolf alleges that he was subject to an unlawful search and seizure, and also alleges that Defendants deprived him of attorney's fees. (App. 10a). Also, Mr. Hugger, Mr. O'Brien and Mr. Myers seek damages for alleged malicious prosecution.

In 1995, a dispute allegedly arose between Berwick Township Supervisors and the BTMA regarding a sewer project. (App. 10a; Comp. at ¶14). Purportedly, in June 1997, Mr. Coleman, a Berwick Township Supervisor, called

2. References to the Appendix attached to the Petition for a Writ of Certiorari are set forth as "App. __"; references to the Plaintiffs' Complaint are set forth as "Comp. at __."

attorney Wolf and told him that the Township would not pay his legal fees unless Wolf, ". . . used his influence to support the Township's position with regard to the aforementioned sewer project." (Comp. at ¶17). In August 1997, the Township allegedly acted to take over the sewer project presumably by way of mandamus action. (Comp. at ¶19). Wolf was directed by the BTMA to defend the mandamus action on behalf of the BTMA. (Comp. at ¶19). The Township prevailed in the mandamus action early in 1998. (Comp. at ¶19).

Allegedly, the Township is required to pay Mr. Wolf's legal fees. (Comp. at ¶17). The Complaint alleges that Wolf's attorney's fees totaled $11,376.00, including defense of the mandamus action. (Comp. at ¶¶19, 20). This dispute, which is actually a billing dispute, purportedly forms the basis for Count II of Plaintiffs' Complaint, alleging a violation of Mr. Wolf's First and Fourteenth Amendment rights. (App. 10a).

Meanwhile in July 1997, the Complaint alleges that the Township authorized Defendant, Alan Carey to file a private criminal Complaint against Hugger, O'Brien and Myers for violations of the Sunshine Act. (App. 11a; Comp. at ¶21). After a District Justice hearing, the Plaintiffs were found guilty of these violations. (App. 11a; Comp. at ¶22). However, Plaintiffs/Petitioners appealed to the Common Pleas Court of Adams County and eventually, in the spring of 1999, the charges were dropped by Mr. George. (Comp. at ¶¶23, 24). Allegedly, this was done only after Defendants, George, the District Attorney, Coleman, Carey and the Township offered to drop the charges if Plaintiffs donated $50 to a charity. (Comp. at ¶25). When the Plaintiffs refused, Defendants allegedly asked Plaintiffs to resign. (Comp. at ¶25). At the time, Defendants purportedly offered to pay Mr. Wolf's legal fees. (Comp. at ¶25). In the fall of 1999, it was announced that the charges had been *nolle prossed* because they, ". . . served no use for public purpose." (Comp. at ¶24). As the District

Court observed, the initial charges are those alleged by Plaintiffs in Count III of their Complaint to have been maliciously brought against them in the first place. (App. 11a).

On May 22, 1998, Defendants, Yannetti, an Assistant District Attorney, O'Brien and Wilson allegedly searched Mr. Wolf's office, and downloaded files from his computer onto computer disks pursuant to a search warrant obtained by the Adams County District Attorney's Office. (Comp. at ¶¶27, 28 and 31). ADA Yannetti reportedly told Mr. Wolf that District Attorney George sent him to Wolf's office. (Comp. at ¶29). The search was made pursuant to a search warrant, although the Complaint alleges that the probable cause Affidavit in support of the search warrant was baseless. (Comp. at ¶31). The warrant was issued by District Justice Mervin L. Dubs on May 22, 1998.[3] County Detective M.J. O'Brien was the affiant on the Affidavit, which Affidavit set forth that: Larry Wolf was the Solicitor for the BTMA; Wolf filed a civil action against the BTMA seeking payment for his legal representation of the BTMA; and that Wolf filed an Answer with confession of judgment on behalf of the BTMA admitting the allegations in the Complaint. (See Warrant and Affidavit).

Respondent, Detective Kevin Wilson of the Borough of Gettysburg Police Department executed an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 setting forth his personal knowledge of the facts material to the dispositive motion filed below.[4] Essentially, Detective Wilson assisted Detective O'Brien of the Adams

3. See Search Warrant and Affidavit contained in Appendix attendant to Appellants' Brief in the Third Circuit Court of Appeals hereinafter referred to as "Warrant and Affidavit").

4. The Unsworn Declaration of Detective Wilson is contained in Appendix attendant to Appellants' Brief on appeal in the Third Circuit Court of Appeals and hereinafter is referred to as "Wilson declaration".

County District Attorney's Office with the execution of a search warrant at the law office of Larry Wolf located at 215 Broadway, Hanover Borough, York County, Pennsylvania. (Wilson declaration, ¶2). Wilson's declaration further attests to the fact that he had no involvement with either the preparation of the search warrant and/or the Affidavit or with the presentation of those documents to District Justice Dubs. (Wilson declaration, ¶4). In accordance with the search warrant issued by District Justice Dubs, the Adams County District Attorney's office requested that Wilson obtain files pertaining to the Berwick Township Municipal Authority from Attorney Wolf's office computer. Detective Wilson obtained nine files from the C Drive of the office computer at the premises located at 215 Broadway, Hanover, PA. (Wilson declaration, ¶5).

In Count I of the Complaint, Larry Wolf seeks damages for alleged violations of his Fourth Amendment rights. In Count II, Larry Wolf seeks damages for alleged violations of due process and First Amendment rights pursuant to 42 U.S.C. § 1983. In Count III, Petitioners, O'Brien, Myers and Hugger seek redress for deprivation of their Fourth Amendment rights (malicious prosecution claim). In Count IV, Myers, Hugger and O'Brien allege conspiracy to deprive them of their due process rights. In Count V, all Plaintiffs allege a state law civil conspiracy claim. The individual Petitioners seek damages, including, but not limited to fees, costs, attorney's fees and such other relief as the District Court deemed appropriate.

All Defendants/Respondents moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6). On November 13, 2000, the United States District Court for the Middle District of Pennsylvania granted the Motions to Dismiss in their entirety. On November 17, 2000, Plaintiffs/Appellants filed a Notice of Appeal from that Order. On October 24, 2001, the United States District Court of Appeals for the Third Circuit affirmed the District Court's Order dismissing

Plaintiffs/Petitioners' Complaint in its entirety. Petitioners then filed a Petition for Rehearing and for En Banc Rehearing, which was denied on December 7, 2001 by the Third Circuit Court of Appeals.

On January 22, 2002, Petitioners filed a Petition for a Writ of Certiorari. Respondents, Robert L. Coleman, Michael A. George, Alan Carey, Bernard A. Yannetti, Jr., Matthew J. O'Brien, Kevin Wilson and Berwick Township now file this Brief in Opposition to the Petition for Writ of Certiorari, pursuant to Supreme Court Rule 15.

SUMMARY OF THE ARGUMENT

Plaintiffs/Petitioners, Larry Wolf, Peter Hugger, Fred S. O'Brien and Maurice D. Myers instituted this purported civil rights action against Robert L. Coleman, Adams County District Attorney Michael A. George, Alan Carey, Adams County Assistant District Attorney Bernard A. Yannetti, Jr., Detective Kevin Wilson of the Borough of Gettysburg Police Department, Adams County Detective Matthew J. O'Brien and Berwick Township. Petitioners alleged generally that the Defendants/Respondents conducted an unlawful search of Larry Wolf's law office (Count I); that Defendants/Respondents refused to pay Wolf's legal fees for his work as a part-time Solicitor for the Berwick Township Municipal Authority (Count II); and that Defendants/ Respondents engaged in the malicious prosecution of the remaining Petitioners, O'Brien, Myers and Hugger (Count III). In addition, Petitioners assert both federal and supplemental state law claims for conspiracy (Counts IV and V). All Defendants/Respondents moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6). On November 13, 2000, the United States District Court for the Middle District of Pennsylvania granted the Motions to Dismiss in their entirety. Similarly, on October 24, 2001, the United States

Court of Appeals for the Third Circuit affirmed the District Court's Order dismissing Plaintiffs/Petitioners' Complaint in its entirety.

Specifically, the District Court and the Court of Appeals in its review, properly determined that Petitioner, Wolf failed to state a claim for a Fourth Amendment violation based on the alleged improper search of his office. There was no direct attack on the validity of the applicable search warrant, nor was there any allegation that the officer preparing the warrant application deliberately falsified information or included information in reckless disregard of its truth or falsity.

Similarly, the lower courts properly dismissed Petitioners' Complaint for failure to state a claim for a § 1983 conspiracy. Initially, a § 1983 conspiracy claim is not actionable where this no actual § 1983 violation. In addition, Petitioners' Complaint failed to specifically allege the necessary elements of a conspiracy.

The District Court and the Court of Appeals, in its review, also properly dismissed Count II of the Complaint, in which Mr. Wolf sought to recover unpaid professional fees. Simply, there is no right to receive and/or recover professional fees, which is guaranteed by the Constitution or a federal law. In other words, Petitioners fail to allege a violation of a protected property interest. Count II also fails to state a First Amendment retaliation claim where Mr. Wolf failed to demonstrate that his purported constitutionally protected conduct was a "substantial" or "motivating factor" in the alleged retaliation.

Petitioners, O'Brien, Myers and Hugger's alleged malicious prosecution claim based on the Fourth Amendment and identified as Count III also was properly dismissed by the District Court and Appellate Court, in its review, where the Complaint failed to allege any pretrial deprivation of their personal liberty worthy of protection afforded by the Fourth Amendment.

Count IV of the Complaint, which purported to state a cause of action for deprivation of due process and First Amendment rights by Petitioners, O'Brien, Hugger and Myers was similarly and properly dismissed. In this regard, the District Court and Appellate Court, in its review, properly determined that there was no discernable due process violation and Plaintiffs failed to demonstrate that their alleged protected activity was a substantial or motivating factor in any alleged retaliation by Defendants. The District Court and the Court of Appeals, in its review, properly exercised its discretion in declining to exercise supplemental jurisdiction over Plaintiffs' supplemental state law claim for a civil conspiracy.

Finally, the District Court and the Appellate Court, in its review, properly determined that Respondents, George and Wilson were entitled to immunity. Specifically, Respondent, George, as Adams County District Attorney is entitled to absolute prosecutorial immunity for his role in prosecuting the violations of the Sunshine Act and in his application for the relevant search warrant. Similarly, Detective Wilson is entitled to qualified immunity for his role in the search of Mr. Wolf's office in that it is clear that Wilson could have reasonably believed his conduct did not violate Wolf's rights.

Although Petitioners apparently contend that a Writ of Certiorari should issue in this case because the District Court and the Court of Appeals, in its review, somehow misapplied the law on prosecutorial immunity and also apparently departed from clearly established Third Circuit and United States Supreme Court rulings, the District Court and the Third Circuit, in its review, properly applied established rules of law in this case, including employing the correct standards of review. Petitioners have failed to identify any improper or inaccurate statement of the relevant law utilized by the lower courts, and/or have failed to demonstrate how, in fact, any properly stated rule of law was misapplied in the instant

case. On this basis, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari, thereby affirming the Court of Appeals' Order granting Respondents' Motions to Dismiss.

REASONS FOR DENYING THE WRIT

Petitioners, Larry Wolf, Peter N. Hugger, Fred S. O'Brien and Maurice D. Myers maintain that the Court of Appeals erred in affirming the District Court's Order granting Respondents' Motions to Dismiss in their entirety. Although Petitioners have failed to include a summary of the argument as required by Supreme Court Rule 24(h), Petitioners apparently contend that a Writ of Certiorari should issue in this case because the District Court, and the Court of Appeals in its review, somehow misapplied the law on prosecutorial immunity, and, also, apparently, ". . . departed from clearly established Third Circuit and U.S Supreme Court rulings . . ." (Petition, pp. 5, 14). Petitioners also contend that they sufficiently identified federally guaranteed rights, which Respondents purportedly violated, particularly with regard to Petitioners, Hugger, Matthew O'Brien and Myers' First and Fourth Amendment rights. (Petition, p. 5).

The United States Court of Appeals, Third Circuit, properly affirmed the District Court's ruling dismissing Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief can be granted. Furthermore, the District Court and the Court of Appeals, in its review, properly determined that Defendant/Respondent, George is absolutely immune for his role in regard to the search warrant and search, and from Plaintiffs' § 1983 claims of malicious prosecution. Moreover, both Courts properly determined that Detective Wilson is entitled to qualified immunity with regard to the claims alleged in Count I of Plaintiffs' Complaint relating to the search of Mr. Wolf's office. Additionally, the Third Circuit properly applied established rules of law in this case, including employing the correct standards of review. As such,

there is no basis, pursuant to Supreme Court Rule 10, upon which to issue a Writ of Certiorari in the instant case.

A. LEGAL STANDARD

Petitioners repeatedly claim that the lower courts somehow misapplied the proper standards of review in their review of the dispositive motion below. While Petitioners dispute the application of the standard of review in that its application yielded the dismissal of their Complaint, it is undisputed that the proper standards of review were employed by both the District Court and the Appellate Court as set forth below. Moreover, even a cursory reading of the Opinions filed below demonstrates that both the District Court and the Appellate Court applied properly stated rules of law in their determination of the instant case.

Rule 12(b)(6) of the F.R.C.P. provides that a Defendant may move to dismiss a Complaint for failure to state a claim upon which relief can be granted. The Court must accept as true all factual allegations set forth in the Complaint as well as all reasonable inferences that can be drawn from them. *Nami v. Fauver*, 82 F.2d 63, 65 (3d Cir. 1996). An action should be dismissed pursuant to F.R.C.P. 12(b)(6) where it is certain no relief could be granted under any set of facts that could be proved. *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990). Generally, only allegations of the Complaint, exhibits attached to the Complaint and matters of public record are considered on a Motion to Dismiss; however, a document appended to the Defendants' Motion to Dismiss may be considered if it is concededly authentic and the Complaint is based on that document, thereby preventing a Plaintiff from avoiding proper dismissal by simply failing to attach to the Complaint a dispositive document on which it relied. *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) *cert. denied*, 510 U.S. 1042 (1994).

The standard of review for the Court of Appeals was plenary. *Nami v. Fauver*, 82 F.3d at 65; *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989). On review of a dismissal for failure to state a claim, the Court of Appeals must determine whether Appellants are entitled to relief under any reasonable reading of the pleadings, assuming the truth of all factual allegations in the Complaint, and all reasonable inferences therefrom. *Alexander v. Whitman*, 114 F.3d 1392, 1398 (3d Cir. 1997); *Martin v. Dana Corp.*, 114 F.3d 421, 423 (3d Cir. 1997).

B. THE SEARCH OF WOLF'S OFFICE DID NOT VIOLATE THE FOURTH AMENDMENT

In Count I, Petitioner, Wolf alleges that he was deprived of his Fourth Amendment rights and also alleges a conspiracy to deprive him of those rights. Specifically, Wolf alleges that there was no probable cause to support the search of his office. However, pursuant to 42 U.S.C. § 1983, a Plaintiff must allege and prove that Defendants deprived him of a right secured by the Constitution and laws of the United States. Further, liability under § 1983, ". . . is personal in nature and can only follow personal involvement in the alleged wrongful conduct, shown through specific allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

Initially, although Wolf has brought this Count against Defendant, Coleman, the Complaint is utterly devoid of any factual allegation, which would implicate his participation in the conduct of which Mr. Wolf complains. The only allegation with regard to a deprivation of Mr. Wolf's Fourth Amendment rights attached to Mr. Coleman is that Mr. Coleman knew of the plan to search attorney, Wolf's office and also allegedly tipped off the Press with regard to the same. There is absolutely no allegation that Mr. Coleman

participated in providing information to a law enforcement officer in order to assist in the preparation of a probable cause affidavit and ultimately a search warrant for Wolf's office.

The Complaint identifies only Defendants, Yannetti, O'Brien and Wilson as the individuals who, in fact, searched Wolf's office. (Comp. at ¶28). Wolf alleges only that Yannetti, an Assistant District Attorney was sent to search Wolf's office by District Attorney George. (Comp. at ¶29). Moreover, although Wolf references the fact that his private counsel, ". . . pointed out to Mr. George that the law clearly demonstrated that the probable cause affidavit he had prepared for the bogus search warrant used was baseless," there is absolutely no allegation that this was not a facially valid warrant and/or that Mr. Yannetti and other officers were aware that it was secured through purportedly bad information.

Pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-6 (1978), there is a two-part test to be satisfied by a Plaintiff asserting a § 1983 claim which challenges the validity of a search warrant on probable cause grounds. (App. 13a-14a). The Plaintiff must prove by a preponderance of the evidence the following:

> (1) That the Affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and
>
> (2) That such statements or omissions are material, or necessary, to the finding of probable cause.

Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citations omitted).

There was no direct attack on the validity of this warrant, nor was there any allegation that the officer preparing the

warrant application, ". . . either deliberately falsified information or included information in reckless disregard of its truth or falsity." *See Franks v. Delaware*, 438 U.S. 154, 165-6 (1978). As the District Court properly observed, Wolf does not assert that the Affiant, Defendant, O'Brien made any misrepresentations that were material to the finding of probable cause. Rather, the Plaintiffs', ". . . only specific claim on this matter is that the 'probable cause affidavit [George] had prepared for the bogus search warrant used, was baseless.' " (App. 14a-15a; Comp. at ¶7). The District Court properly deemed this assertion baseless in and of itself. (App. 15a).

In any case, even if Petitioners' argument that Wolf's actions did not establish a violation of the conflict of interest laws were true, although such is denied by Respondents and belied by the District Court's analysis as set forth above, such does not alter the *Franks'* requirements to challenge an affidavit of probable cause at the outset. Simply, as the Third Circuit properly observed, ". . . Appellants failed to allege O'Brien, the affiant, made any false statements, misrepresentations, or omissions that were material or necessary to the probable cause finding." (App. 3a).

Since Petitioners' Complaint failed to contain any such allegation, the District Court, and the Third Circuit in its review, properly determined that Petitioners' failure to comply with the *Franks'* standard necessitated the dismissal of this claim. (App. 3a, 15a). Petitioners have failed to identify any improper or inaccurate rule of law utilized by the lower courts, and/or to establish how, in fact, any properly stated rule of law was misapplied in this instance. On this basis, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

C. COUNT I OF PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR § 1983 CONSPIRACY

To state a claim for conspiracy for purposes of § 1983, Plaintiffs must aver "a combination of two or more persons to do a criminal act, or to do an unlawful act by unlawful means or for an unlawful purpose." *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974); *Panayotides v. Rabenold*, 35 F. Supp. 2d 411 (E.D. Pa. 1999); *Spencer v. Steinman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997). Moreover, the allegations of the conspiracy must be particularized to include:

(1) The period of the conspiracy;

(2) The object of the conspiracy; and

(3) Certain actions of the alleged conspirators taken to achieve that purpose.

Labalokie v. Capital Area Intermediate Unit, 926 F. Supp. 503, 508-09 (M.D. Pa. 1996) (citations omitted). In the context of a 12(b)(6) Motion, the Court in *Panayotides* noted as follows:

> Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain other actions of the alleged conspirators taken to achieve that purpose will be deemed sufficient . . . *Dutton*, 1997 WL 732856 at *2 (*quoting*, *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (internal citations omitted). Further, "agreement" is the sine qua non of a conspiracy. *Spencer v. Stineman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997).

As outlined above, the Complaint is devoid of any facts which indicate that Mr. Wolf's Fourth Amendment rights

were violated in that there is absolutely no evidence of record that anything other than a facially valid warrant was utilized in this search. A § 1983 conspiracy claim is not actionable where there is no actual § 1983 violation. *Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986); *Barkauskie v. Indian River School District*, 951 F. Supp. 519, 539 (D. Del. 1996). Further, even if Mr. Coleman "tipped off the press", which he specifically denies, such does not constitute a criminal act or an unlawful act. The Complaint is devoid of any facts, which establish the existence of a conspiracy or indicate that there was any kind of an agreement between any of the Defendants with regard to the search of Mr. Wolf's office. As the District Court properly determined,

> Plaintiffs fail . . . to allege sufficiently that Defendants engaged in specific instances of conduct based on an agreement or understanding to deprive Plaintiffs of their constitutional rights. Indeed, Plaintiffs made conclusory allegations of conspiracy and, therefore, failed to present sufficient facts to make out a § 1983 conspiracy claim. *Panayotides v. Rabenold*, 35 F. Supp. 2d 411, 420 (E.D. Pa. 1999) (citations omitted).

For these reasons, the District Court and the Court of Appeals, in its review, properly dismissed Wolf's § 1983 conspiracy claim. Petitioners have failed to provide any legitimate basis upon which to grant their Petition for Writ of Certiorari. As such, the Petition must be denied.

D. COUNT II FAILS TO STATE A CLAIM

In Count II, Plaintiff, Larry Wolf presumably seeks to recover alleged "unpaid legal bills", which are actually the subject of a billing dispute, and apparently claims that his due process and First Amendment rights were somehow violated.

Mr. Wolf's claims to recover unpaid professional fees fail to state a claim for a due process violation. Again, in order to establish a *prima facie* case under § 1983, a Plaintiff must show that Defendants acted under color of state law and that they deprived Plaintiff of a right secured by the Federal Constitution or federal law. *Cuffeld v. Supreme Court of Pa.*, 936 F. Supp. 266, 274 (E.D. Pa. 1996). Moreover, in order to establish a substantive due process claim, a Plaintiff must demonstrate that he or she has a property interest protected by the Fourteenth Amendment Due Process Clause. *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000) *citing Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000). In order to state a substantive due process claim, ". . . a Plaintiff must have been deprived of a particular quality of property interest," or an interest which is "fundamental" under the United States Constitution. *Nicholas*, 227 F.2d at 140. Fundamental property interests include those that are, "deeply rooted in the Nation's history and traditions", or are "implicit in the concept of ordered liberty like personal choice in matters of marriage and family." *Woodwind Estates*, 205 F.2d at 142-143. Generally, state created property interests are unworthy of substantive due process protection. *Nicholas*, 227 F.3d at 143.

Mr. Wolf's alleged substantive due process claim in Count II fails to implicate a fundamental property interest or interest worthy of protection. *See Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1179 (3d Cir. 1997) (where Court observed that only fundamental property interests are worthy of substantive due process protection). There is no right to receive and/or recover professional fees, which is guaranteed by the Constitution or a federal law and Plaintiff has not alleged otherwise. *Reich v. Beharry*, 883 F.2d 239, 243-244 (3d Cir. 1989) (attorney's interest in avoiding delay in receipt of payment for bill of professional services rendered in

prosecution of county controller was not entitled to substantive due process protection). Rather, Mr. Wolf's claims are either in the nature of a breach of contract, some type of conversion action or other state law claim. As the Third Circuit observed, ". . . because Appellants do not allege violations of protected property interests protected by the Fourteenth Amendment – the threshold question in any substantive due process claim – their claim with regard to Wolf's attorney fees was properly dismissed." (App. 4a (citations omitted)).

Mr. Wolf's First Amendment claim, which is somehow based on Defendants' alleged refusal to pay attorney's fees, likewise fails to state a claim upon which relief can be granted. It is axiomatic that there is no *respondeat superior* liability under § 1983. *Rizzo v. Goode*, 423 U.S. 362, 377 (1978). Rather, as the Supreme Court held in *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), it is only, ". . . when the execution of the government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." As the Supreme Court observed:

> Locating a "policy" insures that a municipality is held liable only for those deprivations resulting from the decision of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality as well.

Board of the County Commissioner of Bryan County, Oklahoma v. Jill Brown, 520 U.S. 397, 117 S. Ct. 1382, 1388 (1997) (citations omitted). Mr. Wolf must also establish that the alleged municipal action taken was with a reckless degree of culpability and a direct causal link between the municipal action and the deprivation of federal rights. *Id.* While Mr. Wolf has alleged an "objective" of Defendants, there is no allegation of any specific Township policy, practice or custom which directed or caused the deprivation of any federally protected right, particularly a violation of any

First Amendment right. On this basis then, Count II fails to state a claim upon which relief can be granted against Berwick Township.

In addition, Count II fails to state a claim for any violation of Petitioner, Wolf's First Amendment rights pursuant to 42 U.S.C. § 1983. Initially, § 1983 requires state action. Again, Plaintiffs' Complaint is alleged in terms of "objectives". Beyond any allegation that certain individuals had a political agenda, Plaintiffs have not alleged that any official action was taken by any individual in their official capacity.

Further, the Complaint does not state a claim for a First Amendment retaliation claim. In order to establish a § 1983 First Amendment retaliation claim, the Plaintiff has the burden of demonstrating that his or her, ". . . constitutionally protected conduct was a 'substantial' or 'motivating factor' in the relevant decision." *Nicholas*, 227 F.3d at 144. Thereafter, the burden shifts to a Defendant to show, ". . . by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." *Nicholas*, 227 F.2d at 144.

Count II fails to state a claim for First Amendment retaliation where there is no allegation that whatever activity Mr. Wolf was allegedly denied is a protected activity. There is no allegation that the protected activity was a substantial or motivating factor in any alleged retaliation. Moreover, as the District Court observed, Mr. Wolf has not asserted in Count II, ". . . any constitutionally protected conduct or right that has been deprived by Defendants' . . . refusal to pay Wolf's attorney's fees . . ." (App. 14a). Count II of Plaintiffs' Complaint fails to implicate the First Amendment and, as such, fails to state a claim for either a due process violation and/or a First Amendment violation pursuant to 42 U.S.C. § 1983.

Similarly, any claim of conspiracy based on the deprivation of those rights must fail where a § 1983 conspiracy claim is not actionable where there is no actual § 1983 violation. *Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986); *Barkauskie v. Indian River School District*, 951 F. Supp. 519, 539 (D.E. Del. 1996).

For these reasons, the District Court and Court of Appeals in its review properly dismissed Petitioners' conspiracy claims. Petitioners have failed to provide any legitimate basis upon which to grant their Petition. As such, its must be denied.

E. THE PROSECUTION OF THE BTMA MEMBERS FOR VIOLATION OF THE SUNSHINE ACT IS NOT A SEIZURE UNDER THE FOURTH AMENDMENT

In Count III, Petitioners, O'Brien, Myers and Hugger allege a malicious prosecution claim based on the Fourth Amendment. Essentially, the Petitioners allege that the violations of the Sunshine Act were brought against them maliciously by Defendants purportedly in retaliation for the Plaintiffs' involvement with the BTMA. The United States Supreme Court has determined that, ". . . a claim of malicious prosecution under § 1983 cannot be based on substantive due process considerations, but instead must be based on a provision of the Bill of Rights providing 'an explicit textural source of constitutional protection.' " *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000) *citing Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807 (1994).

Petitioners fail to set forth how prosecution for violation of the Sunshine Act constitutes either malicious prosecution or a seizure under the Fourth Amendment.

To establish a § 1983 claim for malicious prosecution, the Petitioner must establish: (1) the elements of the common

law tort; and (2) a violation of the Fourth Amendment. The tort has the following elements:

a. The defendant initiated a criminal proceeding;

b. The criminal proceeding ended in the plaintiff's favor;

c. The proceeding was initiated without probable cause; and

d. The defendants acted maliciously or for a purpose other than bringing the plaintiff to justice.

Merkle v. Upper Dublin School District, 211 F.3d 783, 791 (3d Cir. 2000). *See also Albright v. Oliver*, 510 U.S. 266, 271 (1994) (petitioner must plead not only the elements of the common law tort, but also a violation of the Fourth Amendment).

Neither Petitioners' brief, nor the Complaint, indicates compliance with elements (b) and (c) above. Respondents simply admit that the District Justice found "against the aforementioned Petitioners." (Petition, pp. 7-8).

Petitioners challenge the District and Appellate Courts' decisions, which found that being prosecuted for Sunshine Act Violations (which were later dismissed) was not a seizure. (Petition, p. 8). Petitioners contend that being forced to attend a trial, without more, is considered a "seizure" under Third Circuit precedent; Petitioners are wrong, as the Court in *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000), noted that whether malicious prosecution is found to be a seizure, depends upon whether the "petitioner's liberty 'was constrained in multiple ways for an extended period of time.' " *Id.* at 792, *citing Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998). The restrictions on plaintiff's liberty in *Gallo* consisted of

the following: "he had to post a $10,000 bond; he had to attend all Court hearings, including his trial and arraignment; he was required to contact Pre-Trial Services on a weekly basis and he was prohibited from traveling outside of New Jersey and Pennsylvania." 161 F.3d at 222. Even though the restrictions in *Gallo* were much more onerous than anything pled in the present case, the Court still held that whether such restrictions amounted to a seizure was "a close question . . ." *Id.*

Petitioners' Complaint alleges no constraint of liberty sufficient to constitute a seizure and Petitioners' brief misstates the Third Circuit precedent on this issue. As such, the Third Circuit Court opinion dismissing this claim must be affirmed.

In addition, as argued above, the Township cannot be liable under § 1983 without a policy, practice or custom identified as the moving force behind the alleged deprivation of a federally protected right. *Monell*, 436 U.S. at 694. On this basis, Plaintiffs' Complaint also fails. Similarly, any conspiracy claim based on the alleged deprivation of the Fourth Amendment right likewise fails. *Barkauskie*, 951 F. Supp. at 539.

F. COUNT IV FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Presumably, Count IV of Plaintiffs' Complaint attempts to state a cause of action for deprivation of due process and First Amendment rights. Specifically, Plaintiffs, O'Brien, Hugger and Myers claim that they were retaliated against somehow with regard to the BTMA and the aforementioned sewer project. Initially, this Count again fails to state a claim against the Township since Plaintiffs have failed to allege and/or identify any specific policy, practice or custom which was the moving force behind the alleged deprivation of these rights. *Monell*, 436 U.S. at 694.

With regard to the alleged deprivation of a due process right, there is no discernible alleged due process violation. For instance, there is no allegation that Plaintiffs were deprived of property without due process of law. There is no allegation that Plaintiffs were improperly removed from office. Indeed, Plaintiffs apparently were afforded hearings on the Sunshine Act violations and any action with regard to the disputed sewer project was done pursuant to a legal mandamus action. (Comp. at ¶19). Plaintiffs do not, therefore, apparently claim a due process violation as a result of these hearings.

Plaintiffs have not alleged that their liberty interests have been deprived in any way; for instance, Plaintiffs have not alleged any claim for defamation.

To the extent that Plaintiffs allege a substantive due process claim purportedly grounded in their Fourth Amendment malicious prosecution claim, such is not viable. As outlined above, a § 1983 malicious prosecution claim cannot be based on a violation of substantive due process. *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000). Rather, ". . . where a particular amendment provides an explicit textural source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims." *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998) (internal quotations omitted).There is no viable claim for an alleged procedural or substantive due process violation. As such, the District Court and the Court of Appeals, in its review, properly dismissed Count IV of Plaintiffs' Complaint on this basis.

With regard to the alleged § 1983 First Amendment retaliation claim, Plaintiffs' Complaint again fails to allege any constitutionally protected behavior, which has been deprived by the Defendants. There is absolutely no allegation that the alleged protected activity was a substantial or motivating factor in any alleged retaliation claim. *See Mt. Healthy City School*

District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); *Nicholas*, 227 F.3d at 144.

Similarly, for the reasons stated above, a § 1983 conspiracy must be based on a § 1983 violation. Since Count IV fails to state a claim, any conspiracy claim based on the same likewise fails. Accordingly, the lower Courts properly determined that Plaintiffs failed to state a claim upon which relief could be granted for any alleged due process or First Amendment violation in Count IV of their Complaint. These Orders must be affirmed.

G. DISTRICT ATTORNEY GEORGE IS ENTITLED TO ABSOLUTE IMMUNITY

District Attorney George is entitled to absolute immunity for his involvement in permitting the application for the search warrant and in prosecuting Petitioners for violation of the Sunshine Act.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that prosecutors enjoy absolute immunity from civil damages under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case." *Id.* at 431. The preparation and filing of support information for a warrant and the determination that the evidence is sufficient to justify a probable cause finding are all protected by absolute immunity. *Kalina v. Fletcher*, 118 S. Ct. 502, 505, 510 (1997).[5]

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5. While Petitioners rely on *CPC v. State Ethics Commission*, 698 A.2d 155 (Pa. Cmwlth. 1997), presumably for the proposition that the State Ethics law was inapplicable to Attorney Wolf, the fact remains, as purportedly alleged, that D.A. George, who enjoys absolute immunity, made the decision to initiate prosecution and to prepare and to file support information for a warrant, and also made the determination that the facts at bar were sufficient to satisfy probable cause. These functions are all protected by absolute immunity. *Kalina v. Fletcher*, 118 S. Ct. at 505, 510.

District Attorney George also enjoys immunity for prosecuting Petitioners for violating the Sunshine Act, as prosecutorial immunity covers "the professional evaluation of the evidence assembled by the police and appropriate preparation . . . at trial . . ." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993); *Burns v. Reed*, 500 U.S. 478, 492 (1991). Such immunity covers a prosecutor's decision regarding which cases to file, *Elder v. Athens Clarke County*, 54 F.3d 694, 695 (11th Cir. 1995), and whether to prosecute at all. *Roe v. San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997). It also protects a prosecutor's request that "the Court enter an Order of *nolle pros equi* . . ." *Brooks v. George County*, 84 F.3d 157, 168 (5th Cir.) *cert. denied*, 117 S. Ct. 359 (1997).

In Petitioners effort to cast District Attorney George's role in the prosecution of the Sunshine Act or preparation of the search warrant as "investigatory," they misstate the facts pled in the Complaint. For example, Petitioner's brief states: "George prepared a search warrant application [Affidavit] for O'Brien that alleged that Wolf was covered by the Ethics Act when he knew he was not." (Petition, p. 7). Petitioners also state "Mr. George prepared the search warrant application and had O'Brien sign it. He did the purported investigation and he applied for the search warrant." *Id.* at 8. Finally, Petitioners state that District Attorney George "didn't wear his D.A. hat to prosecute this Complaint – he acted as a lawyer [though Petitioners note] . . . the record [on this point] is perhaps at best, ambiguous . . ." *Id.* at 8-9.

Petitioners' claim regarding George's role in either the search warrant or Sunshine Act prosecution is not supported by any section of the Complaint. In fact, the District Court noted that the Affidavit of Probable Cause was not prepared or signed by District Attorney George, but in fact was prepared by Detective O'Brien. (App. 17a-18a). Further, George's role in the Sunshine Act violation was to prosecute – something afforded immunity, notwithstanding

Petitioner's effort to ascribe some nefarious role to the prosecution. Thus, George is absolutely immune from all claims related to the search warrant. The District and Appellate Courts' ruling in this regard must be affirmed.

H. THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

The District Court and the Third Circuit properly concluded that the Respondents are entitled to qualified immunity from the Petitioners' claims. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court created an objective reasonableness test for analyzing the qualified immunity defense. The Court held in *Harlow* that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights on which a reasonable person would have known." *Id.* The qualified immunity inquiry focuses on whether a reasonable governmental official could believe that his conduct was lawful, in light of clearly established law and the information in the official's possession. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This Court has also noted that the qualified immunity defense "gives ample room for mistaken judgments" and provides ample protection to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341-343 (1986); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Although the issue is often addressed on summary judgment, "qualified immunity questions" should be resolved at the earliest possible stage of the litigation. *Anderson*, 483 U.S. at 646, n.6. Thus, if the wrongful conduct alleged is that which a reasonable official could have believed lawful, dismissal is appropriate before discovery. *See, Id.*

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), this Honorable Court refined the qualified immunity standard. As a threshold matter, the District Court must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Id.*, 121 S. Ct. at 2155. If the allegations do not establish the violation of a constitutional right, then the governmental official is entitled to qualified immunity. *Id.* at 2156.

After a careful review of the record, both the District Court and the Third Circuit concluded that Plaintiffs' Complaint had not alleged any cognizable constitutional claims. Both the District Court and the Third Circuit concluded that Plaintiffs were not entitled to any relief on the § 1983 claims arising out of: the refusal to pay Petitioner Wolf's legal fees; the search of Petitioner Wolf's law office; the prosecution of Petitioners O'Brien, Meyers and Hugger for violation of the Sunshine Act; Petitioners' substantive due process claims; and the § 1983 conspiracy claims. Clearly, the courts below applied the correct legal standard in evaluating the qualified immunity defense and properly concluded that Plaintiffs had not alleged any facts establishing that the Respondents' actions deprived them of any federally protected right.

Petitioners' claims against Respondent Wilson arise solely out of the execution of the search warrant at Attorney Wolf's office on May 22, 1998. In the proceedings below, Respondent Wilson maintained that he was immune from liability as a matter of law because his sole involvement in this case was the participation in the execution of a facially valid search warrant which was approved by the Adams County District Attorney's office and by District Justice Dubs, a detached and neutral magistrate.

In *United States v. Leon*, 468 U.S. 897 (1984), the court held that inadequate probable cause does not necessarily

render a warrant facially invalid nor prevent reasonable belief in the existence of probable cause. Moreover, *Leon* emphasized that generally an officer cannot be expected to question the Magistrate's probable cause determination. Respondent Wilson was not the affiant on the probable cause affidavit but merely executed the search warrant approved by the District Justice. Under these circumstances, the courts below properly concluded that Respondent Wilson was immune from liability as a matter of law on Petitioners' Fourth Amendment claims.

In their Petition for Writ of Certiorari, Petitioners assert that the Third Circuit Panel had to address and consider the holdings in *Wilson v. Layne*, 526 U.S. 603 (1999) and *Hanlon v. Berger*, 526 U.S. 808 (1999). Both of those cases address the issue of whether media involvement in the execution of a search warrant implicates the Fourth Amendment. Plaintiffs' reliance on *Wilson* and *Hanlon*, however, is misplaced. It is important to note that the search warrant at issue in this case was executed on May 22, 1998, which was prior to the Court's rulings in *Wilson* and *Hanlon* in 1999. Petitioners have not, and cannot cite to any case law decided prior to May, 1998 in which it held that media involvement in the execution of a search warrant violated the Fourth Amendment. Since the law was not clearly established at the time the Respondents executed the search warrant, qualified immunity applies.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court deny Petitioners Petition for a Writ of Certiorari.

Respectfully submitted,

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